Supreme Court, U.S.
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No. 99-917

IN THE

Supreme Court of the United States

PINKLEY INCORPORATED t/a "Bradley Books",

Petitioner,

v.

ROBERT A. SERVACEK, DAVID S. GEARINGER, JOHN LAMMERS, Individually and in their official capacities as police officers of Frederick City Police Department City of Frederick, Maryland; RICHARD J. ASHTON, Individually and in his official capacity as a Major and Chief of Frederick City Police Department and policy maker of City of Frederick, Maryland; and the Mayor and Board of Alderman of City of Frederick, Maryland constituting and acting as City of Frederick, Maryland,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents, in their Brief in Opposition submit their argument under a single "Argument" title but in doing so raise three new points for this Court's consideration to which Petitioner files its Reply Brief herein. They argue: (1) Petitioner presents no argument, as they deem is necessary for certiorari review, that the decision of the Court of Appeals was in conflict with the decisions of another Court of Appeals or a State Court of last resort on an important federal question; (2) Petitioner has not argued that the Court of Appeals departed from the accepted and usual course of judicial proceedings or sanctioned such a departure; and (3) Overwhelming authority contrary to Petitioner's position makes Petitioner simply wrong.

ARGUMENT IN REPLY

Respondents apparently has completely overlooked the provisions of Supreme Court Rule 10, and 10 (c), upon which Petitioner sought certiorari, by basing their response upon the terms of Supreme Court Rule 10 (a) seeking denial of review by certiorari.

The Petition presented by Pinkley, Inc. specifically sought certiorari review under the introductory provision of Rule 10 as well as the specific provisions of Rule 10 (c) claiming that, while recognizing review is within this Court's discretion, there are compelling reasons for granting review because a Court of Appeals has decided each of these important federal questions in a way that conflicts with relevant decisions of this Court.

Respondents sub silentio apparently concede that District Court Judge Bowers merely reviewed the application and issued the warrant and made no independent, neutral and detached judicial determination of probable cause himself but relied solely upon the police officer's determinations (Brief In Opp., pp. 1 Statement of the Case). However, the Respondents affirmatively admit that the search team (police defendants here) jointly executed the search warrant during which "Servacek determined what materials would be seized by attempting to assess whether an item fit within the definition of obscene as set forth in the warrant application."

Although they concede that Respondents Servacek, Gearinger and John Lammers (Servacek's search and seizure team) jointly conducted the search and seizure effort, they only concede that Servacek alone determined what speech materials would be seized in an apparent effort to escape joint liability with him in engaging in a prohibited mass seizure of presumptively protected works of expression.

The District Court Judge, in his "Findings of Fact" NO. 20 found that upon review of the warrant application Judge Bower issued the warrant but the District Judge did not state that Judge Bower made no finding of fact, that probable cause existed as a independent, neutral and detached judicial officer, and under the warrant's terms directed the police officer to determine what was to be seized under it. Yet under his "Conclusions of Law' NO. 2 he found that Judge Bower somehow had probable cause to issue the warrant but did not mention that Judge Bower made absolutely no finding of probable cause but simply rubber stamped the police officers determination. Equally as egregious is his conclusions of law NO. 3 that the language of the warrant limited the discretion of the police officer to that which he determined came within

the non-sanctioned obscenity definition he himself put in the warrant he prepared. Nothing was set out about a total lack of particularity as to what was to be seized.

The Court of Appeals simply summarily affirmed the District Court findings, legal rulings and dismissal for the very erroneous and unconstitutional reasons set out by the District Court.

Respondents have cited several decisions of the Fourth Circuit and one Seventh Circuit decision as somehow confirming its position that no conflict between federal Circuits existed and that overwhelming Circuit precedent existed against Petitioner.

The Respondents apparently are of the opinion that decisions between Circuits must be in conflict whereas Petitioner relies upon this Court's decisions as paramount constitutional law. Thus the basis for review.

The following are some of the compelling rulings of this Court refuting the Respondents' claims of overwhelming authority contrary to Petitioner's position.

This Court has firmly stood as a bar against issuance of a search and seizure warrant or order supported only by police determinations or by prosecutor's review without an independent judicial finding of probable cause. Lee Art Theaters v. Virginia, 392 U.S. 636, holding to that effect is in good company with Gerstein v. Pugh, 420 U.S. 103, Coolidge v. New Hampshire, 403 U.S. 443, 449-53, Shadwick v. City of Tampa, 407 U.S. 345, Lo-Ji Sales v. New York, 442 U.S. 319, and Blount v. Rizzi, 400 U.S. 410. Thus this Court's holdings remove alleged overwhelming Circuit authority on that point.

This Court has also stood firmly as a bar against a failure to particularize the items of speech works to be seized allowing police to make ad hoc determinations and allowing mass seizures of speech Stanford v. Texas, 397 U.S. 476, 481, Lo-Ji Sales v. New York, 442 U.S. 319, 325, Marshall v. Barlows, Inc. 436 U.S. 307, 311, Marcus v. Search Warrants, 367 U.S. 717, 724, and Roaden v. Kentucky, 413 U.S. 496, 502. Thus alleged overwhelming Circuit authority permitting such warrants, even if existing, cannot overwhelm these holdings of this Court.

Respondents reliance upon U.S. v. Espinoza, 641 F2d 153 (CA 4, 1981) is misquoted as to its facts and application. The Espinoza warrant for searching a warehouse for obscene magazines including but not limited to "erotic hands" actually resulted from evidence seized in a 1976 federal California search warrant in Las Vegas with detailed affidavits. The only evidence admitted in Espinoza were photos taken in the Nevada warehouse and the suppression claim was not made by J.E. Enterprises, owner of the warehouse, who was tried in absentia but by Espinoza who had no standing to object. Espinoza erroneously argued the Magistrate erred by not personally viewing the magazine but relying in affidavits.

Similarly, in Sequoia Books v. McDonald, 725 F2d 1091 (CA 7, 1984) there were described 9 items in a detailed affidavit and the warrant ordered seizure of them and others with specified sexual conduct. Later the People v. Eagle Books, Inc. 602 NE2d 798 decision in that State held such conduct provisions for seizure and particularity as prohibited general warrants. Also this Court subsequently decided Ft. Wayne Books v. Indiana, 489 U.S. 46 from the Sequoia Circuit Court which rejected such general warrants for officers

to seizure similar materials. Therefore the overwhelming authority lies in this Court and claims of comparable Circuit decisions are of no value.

For these reasons the Respondents new points and issues should be rejected and Petitioner urges this Court to vacate the judgment of the Circuit Court and direct it on remand to reverse the District Court as to all three civil rights counts.

Respectfully submitted,

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